IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 961 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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MAHMAD @ BATUK KARIMBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 961 of 1992

MR BS SUPEHIA for Petitioner No. 1

MR DP JOSHI, APP for Respondent

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 26/09/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

In this appeal, which is filed under section 374(2) of the Code of Criminal Procedure, 1973, the appellant has challenged legality of judgment dated September 30, 1992 rendered by the learned Additional Sessions Judge, Rajkot, in Sessions Case No.23/92, by which he is convicted of the offences punishable under section 302 of the Indian Penal Code as well as section 135 of the Bombay Police Act and punished with imprisonment for life and fine of Rs. 1000/- i/d. R.I. for three months.

2. Briefly stated the case of the prosecution is as under :-

Dhirajlal Nanalal Mehta, PW.13, Exh.33 was serving as a postman at village Sapar, Taluka : Sayala, District : Surendranagar. He was married to Nirmalaben who was original accused no.2 in the case. During the subsistence of marriage, Nirmalaben had given birth to a girl child named Sangita and all the three were residing together. The name of neighbour of Dhirajlal was Raningbhai Jaitabhai Karpada,who was a Kathi Darbar. Neighbour Raningbhai was residing with one Mohammedan woman named Babybai, who was mother of a son and a daughter, as Ranigbhai was in love with Babybai. Rakhtabibi was residing in the house of Raningbhai with her children. The record shows that the original accused no.2 was of loose character and had relations with deceased Bhikhubhai Barot of Surendranagar town who was visiting her in absence of her husband. The name of brother of Babybai is Mohmed Karim @ Batuk, who is the present appellant and he was coming off and on to the house of her sister situated at village Sapar.

3. The appellant after coming into contact with the original accused no.2, had developed relations with her and enticed away married wife of witness Dhirajlal in the company of her minor daughter. From village Sapar, wife of Dhirajlal in company of the appellant and her minor daughter had come to Chotila and from Chotila they had gone to village Jamjodhpur. At village Jamjodhpur, all the three had stayed for about two months with wife and daughters of one Karimbhai. It may be stated that during his stay at village Jamjodhpur, the appellant was doing labour work of excavating land and was also taking wife of Dhirajlal Mehta with him for doing labour work. At village Jamjodhpur, wife of Dhirajlal had learnt that in search of her and her daughter, her husband and her brother-in-law were likely to come to village Jamjodhpur.Therefore, they had left village Jamjodhpur

and gone to village Satadhar. All the three were wondering from place to place and had ultimately, come to Rajkot City. At Rajkot City, they had stayed in a caravanserai. After staying at caravanserai for some days, the appellant had started living in a rented accommodation situated at Chunarvad Chowk of Rajkot City with the original accused no.2 and her daughter. Meanwhile the husband of original accused no.2 had learnt that his wife and daughter were staying with the appellant in a house situated at Chunarvad Chowk, Rajkot City and apprehending that the husband of the original accused no.2 would come to the house situated at Chunarwad Chowk, all the three had left the said house and the original accused no.2 who was wife of witness Dhirajlal and his daughter were begging and feeding themselves. One day, original accused no.2 proposed to her daughter that they need not ruin their lives and that they should return to village Sapar where her husband was staying. Accordingly, original accused no.2 in the company of her minor daughter had returned to village Sapar where witness Dhirajlal was serving as a postman. However, Dhirajlal had exhibited sheer contempt for original accused no.2 and not asked her any question as to where she was all the time before her return to village Sapar. After a week the appellant had come to village Sapar and proposed to original accused no.2 to go with him. Therefore, the original accused no.2 had left her matrimonial home in the company of her minor daughter and gone to Surendranagar with the appellant. At Surendranagar town also they had stayed in a caravanserai and had met deceased Bhikhabhai. The appellant had persuaded deceased Bhikhabhai to go with him and Bhikhabhai had accompanied the appellant as well as accused no.2 and her minor daughter after packing his clothes in a bag. From Surendranagar, all the four had reached Rajkot by train on October 29, 1991 and though an attempt was made by the deceased, they could not get any accommodation in any caravanserai. Therefore, they had gone towards Khodiar Temple situated at the base of the hill. All the four had gone to sleep and at dawn, the appellant had inflicted pipe blows on the head of the deceased and killed him. Thereafter the appellant in the company of original accused no.2 and minor child had left the said place and the appellant had thrown the pipe which he had used to kill the deceased in hay. According to the prosecution, the appellant had killed deceased Bhikhabhai because the deceased had illicit relations with the original accused no.2. After leaving the place of the incident, the three had come to Junagadh where the appellant had given clothes of the deceased to a mendicant. At Junagadh, the three had stayed in a

caravanserai and from Junagadh they had gone to village Bilkha. At village Bilkha, father of the appellant was staying and, therefore, all the three had stayed there for about 15 to 20 days. Thereafter again these three persons had come to Junagadh town where the original accused no.2 and minor child were made to beg. At Junagath, the appellant had quarrelled with some one and, therefore, original accused no.2 who was wife of witness Dhirajlal, had separated from him and started staying at 'Shishu Mangal', which is an institution for destitute ladies and children, with her minor daughter. At Shishu-Mangal also the appellant had continued to visit the original accused no.2 and, therefore, pursuant to the complaint made by other inmates, those who were in the management of Shishu-Mangal had driven away accused no.2 and her minor daughter from the said institution.

4. Meanwhile, the unidentified dead body of the deceased Bhikhabhai was noticed by corporator Karmabhai Maldhari of Rajkot city on October 31, 1991 and he had disclosed the said fact on telephone to police officer incharge of 'B' Division Police Station, Rajkot city. Necessary entry was made in the register maintained at the police station and further investigation into the case was handed over to P.S.I. Gulabrao Viralal Pavar. Mr. Pavar had gone to the place where the dead body was lying and had held inquest on the dead body in presence of panch witnesses. Mr. Pavar had also seized blood stained earth from the spot as well as other articles belonging to the deceased which were found on the spot. Mr. Pavar had lodged complaint with 'B' Division Police Station, which was reduced into writing by Dolatsinh Bhupatsinh Raol, who was incharge Police Inspector of the said Police Station. Because of the articles which were recovered from the dead body of the deceased, the deceased was identified as Bhikhabhai of Surendranagar town and his relatives were contacted. The brother of the deceased i.e. Rajubhai had identified the dead body kept in post mortem room as that of his brother Bhikhabhai and further investigation into the case was made by Indrasinh Shitalsinh Bhadoria, who was Police Inspector of 'B' Division Police Station. The interrogation of brother of the deceased revealed that the deceased had left his house in the company of the appellant. The appellant was arrested on November 15, 1991 under a panchnama. Further pursuant to voluntary disclosure made by the appellant, the bed-sheet used by the appellant for the purpose of sleeping as well as iron pipe with which he had given blows to the deceased, were discovered in presence of independent witnesses. The incriminating articles seized were found stained with

blood and were, therefore, sent for analysis and report of serologist was obtained. On conclusion of investigation, the appellant and original accused no.2 were chargesheeted in the Court of learned Judicial Magistrate, First Class, Rajkot of the offences punishable under sections 302 & 114 of the Indian Penal Code and sections 37(1) & 135 of the Bombay Police Act. As the offence punishable under section 302 I.P.C. is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Rajkot for trial, where it was numbered as Sessions Case No. 23/92.

5. The charge at Exh.2 was framed by the learned Additional Sessions Judge, Rajkot against the appellant and original accused no.2 of the offence punishable under section 302 read with section 114 I.P.C. as well as sections 37(1) & 135 of the Bombay Police Act. We may state that the appellant and original accused no.2 were not in a position to engage their own counsel for the purpose of defending themselves and, therefore, the learned Judge before framing the charge, by an order dated July 1, 1992 had appointed Shri N.S.Manek, advocate of Rajkot to defend the appellant and original accused no.2. The charge was read over and explained to the appellant as well as original accused no.2, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined; (1) Jayantilal Dhirajlal Kainaya, PW.1,Exh.8, (2) Kirtibhai Jamnadas, PW.2 Exh.11, (3) Rajubhai Naranbhai, PW.3, Exh.12, (4) Labhuben Bhikhabhai, PW.4, Exh.14, (5) Galalben Panchabhai PW.5, Exh.15, (6) Dhirubhai Kalubhai Barot, PW.6 Exh.16, (7) Kanubhai Bavabhai Vasava, PW.8 Exh.18, (8) Child witness Sangita Dhirajlal PW.9 Exh.24, (9) Harshadkumar Kashirambhai Raval, PW.10 Exh.25, (10) Umeshgiri Maharajgiri,PW.11 Exh.27, (11) Manishanker Gokaldas Joshi, PW.12 Exh.29, (12) Dhirajlal Nanalal Mehta, PW.13 Exh.33, (13) Karshan Vikabhai, PW.14 Exh.34, (14) Rekhaben Parshotambhai, PW.15 Exh.35, (15) Vasantrai Dolatram Bhatt, PW.16, Exh.36, (16) Jaysukhlal Narsidas, PW.17 Exh.38, (17) Arif Harunbhai,PW.18, Exh.40, (18) Dhanji Malabhai,PW.19, Exh.42, (19) Bhagwanji Bachubhai, PW.20 Exh.44, (20) Kanubhai Ghelabhai,PW.21, Exh.45, (21) Meghji Manji, PW.22 Exh.47, (22) Dr. Bhavin Sharatchandra Kothari, PW.23 Exh.49, (23) Malikshah Alibhai, PW.24 Exh.63, (24) Ramesh Bijalbhai Koli, PW.25 Exh.64, (25) Bhanubhai Jagabhai, PW.26 Exh.66, (26) Dhirajlal Narshibhai, PW.27 Exh.69, (27) Premji Mavjibhai, PW.28 Exh.71, (28) Kishor Bachubhai Solanki, PW.29 Exh.72, (29) Jethabhai Virabhai,PW.30 Exh.73, (30) Abed Ali Sidik Miya, PW.31 Exh.74, (31) Chhelshanker Narbheram Trivedi, PW.32 Exh.76, (32) Nathalal Jadav,

PW.33 Exh.78, (33) Naran Jetha, PW.34 Exh.80, (34) Dolatsinh Bhupatsinh Raolji, PW.35 Exh.82, (35) Indrasinh Shitalsinh Bhadoria, PW.36 Exh.86, (36) Pragmal Bhagwanji Rathod, PW.37 Exh.101 and (37) Gulabrao Viralal Pavar, PW.38 Exh.106, to prove its case against the accused. The prosecution also produced documentary evidence, such as, notification issued by the District Magistrate under the provisions of the Bombay Police Act, inquest held on the dead body of the deceased, panchnama of place of occurrence, panchnama regarding discovery of articles made pursuant to voluntary disclosure made by the appellant, postmortem notes of the deceased prepared by Dr.Kothari, report of Serologist, complaint filed by P.S.I. Mr. Pavar, panchnama prepared during identification parade where the appellant was identified by witness Manishanker Gokaldas Joshi as the person who had come to Shri Ratanshi Mulji Dharmashala,situated at Rajkot with the deceased on October 29, 1991 and who had not permitted the appellant and others to stay at his Dharmashala etc. in support of its case against the accused. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellant as well as original accused no.2 the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statement as required by section 313 of the Code of Criminal Procedure. In their further statement, both the accused claimed that the case of prosecution against them was false, but did not examine any witness in support of their defence.

6. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that deceased Bhikhabhai Naranbhai had died a homicidal death. The learned Judge relied upon the evidence of child witness Sangita Dhirajlal and held that it was proved by the prosecution that the appellant had caused death of the deceased on October 29, 1991 by inflicting iron pipe blows on his head and was liable to be convicted of the offence punishable under section 302 I.P.C. The learned Judge also relied upon the circumstantial evidence proved by the prosecution for the purpose of recording conviction of the appellant under section 302 I.P.C. The learned Judge further held that the appellant had committed breach of notification issued under the provisions of the Bombay Police Act and, therefore, was liable to be convicted under section 135 of the said Act. The learned Judge deduced that no reliable evidence was led by the prosecution to prove that the original accused no.2 i.e. wife of witness Dhirajlal had abetted the

offences committed by the appellant and, therefore, she was entitled to acquittal. In view of the above referred to findings, the learned Judge has convicted the appellant of the offences punishable under section 302 I.P.C. as well as section 135 of the Bombay Police Act and imposed punishment referred to above, by judgment and order dated September 30, 1992, which has given rise to the present appeal.

7. After taking us through the entire evidence on record, the only submission made by Mr. B.S.Supehia, learned counsel for the appellant is that the appellant had seen the deceased and original accused no.2 in a compromising position and as there was grave and sudden provocation from the deceased, the offence committed by the appellant would be punishable under section 304 Part-I of the Indian Penal Code and, therefore, conviction of the appellant should be altered to one under Part-I of section 304 of the Indian Penal Code and punishment of 8 years which the appellant has already undergone should be imposed on him for the said offence.

8. As against that, Mr. D.P.Joshi, learned A.P.P. submitted that the evidence of minor witness Sangita Dhirubhai read with medical evidence on record as well as other circumstances proved by the prosecution clearly establish that the appellant had caused death of the deceased with the intention of causing his death and as the death of the deceased was caused with the intention of causing such bodily injuries which were sufficient in the ordinary course of nature to cause death, the offence committed by the appellant would be one under section 302 I.P.C. and not under Part-I of section 304 I.P.C. as contended by the learned counsel for the appellant.

9. We have heard the learned counsel for the parties at length and though only one submission is advanced on behalf of the appellant, we have reappreciated the whole evidence on record to ascertain whether conviction of the appellant recorded by the learned Judge of the Trial Court is correct or not.

The finding recorded by the learned Judge of the Trial Court to the effect that it is proved by the prosecution beyond doubt that the deceased had died a homicidal death is not challenged at all. Even otherwise, we find that the evidence of Dr. Bhavin Kothari PW.23 Exh.49 establishes beyond reasonable doubt that the deceased had died a homicidal death. The doctor has mentioned in detail the external as well as internal injuries sustained by the deceased which were noticed by him while performing post mortem examination of the dead

body of the deceased. According to the doctor, the cause of death of the deceased was coma resulting from the injury to the brain, intra crannial haemetoma and the fracture of the skull. The doctor stands amply corroborated by contemporary record namely contents of the post mortem notes. Further, the injuries sustained by the deceased are also noted in inquest report prepared in presence of panch witnesses. Thus, the finding that the deceased had died a homicidal death being eminently just is hereby upheld.

We may state that the prosecution has led direct evidence of child witness Sangita Dhirubhai to establish case against the appellant and has also adduced circumstantial evidence to prove its case against the appellant. We therefore, propose to discuss first of all the evidence of child witness Sangita PW.9 Exh.24. Before discussing the evidence of child witness Sangita, it would be advantageous to refer to law relating to child witness. Section 118 of the Evidence Act deals with the question of competency of persons to testify. Under this section, all persons are competent to testify,unless they are, in the opinion of the Court,(a) unable to understand the questions put to them, or (b) to give rational answers to those questions,owing to (i) tender years,(ii) extreme old age, (iii) disease of mind or body, or (iv) any other such cause. Even a lunatic, if he is capable of understanding the questions put to him and giving rational answers during lucid period, is a competent witness. With respect to children, no precise age is fixed by law within which they are absolutely excluded from giving evidence on the presumption that they have not sufficient understanding. A child is not an incompetent witness by reason of his age. A child of tender years is not, by reason of his youth, as a matter of law, disqualified as a witness. There is no precise age which determines the question of competency. According to section 118 of the Evidence Act, a child of tender age is a competent witness if it appears that it can understand the questions put to it and give rational answers thereto. This section vests in the Court the discretion to decide whether an infant is or is not disqualified to be a witness by reason of understanding or lack of understanding. When a young child is a witness, the first step for the Judge or Magistrate to take is to satisfy himself that the child is the competent witness within the meaning of section 118 of the Evidence Act and for this purpose, preliminary inquiry should beheld. It is the duty of the Court to ascertain in the best way,which it can, whether from the extent of his intellectual capacity and understanding the child witness is able to give a rational account of what

he has seen, heard or done at a particular occasion or in other words the witness understands the duty of speaking truth or not. Competency of young children can be ascertained by putting a few questions to them in order to find out whether they are intelligent enough to understand what they had seen and afterwards inform the Court thereof. The holding of a preliminary inquiry is merely a rule of prudence and is not a legal obligation upon the Judge. It is desirable that after holding a preliminary inquiry, Judges and Magistrates maintain record incorporating opinion that the child understands the duty of speaking truth. However, absence of recording of such an opinion does not make evidence of a child witness inadmissible. Opinion of the Court in this behalf can be gathered by the Appellate Court from circumstances appearing in the case if there is no certificate by the learned Trial Judge. Though no precise criteria for appraising the evidence of a child witness can be laid down, yet one broad test is whether there was possibility of any tutoring. If this test is found in the positive, the Court will not, as a rule of prudence, convict the accused on a murder charge on the basis of child evidence unless it is corroborated to material extent in material particulars, directly connecting the accused with the crime. At the same time,if otherwise the testimony of a child witness is not shown to be tainted with any such infirmities,it calls for due credence. A child in the innocent purity of its mind and unsophistication is more likely to come forth with version which is unbiased, unsoiled, natural and forthright. It is less prone to manipulation, motivation and spirit of vendetta. It can as well be spontaneous and inspiring, once the child is enabled to overcome the initial shock and awe, and ensured protection, security, compassion and given confidence to come out with what was seen. Further, some of the children are fairly intelligent, truthful and straight forward, and there is no reason to start with a presumption of untrustworthiness in the assessment of their evidence. The merit of evidence has to be judged on the touchstone of its own inherent intrinsic worth. In the case of MOHAMED SUGAL ESA MAMASAN RER ALALAH v. THE KING, AIR 1946 Privy Council, 3, it is held as under :

"In England where provision has been made for the reception of unsworn evidence from a child it has always been provided that the evidence must be corroborated in some material particular implicating the accused. But, in the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not.

> Once there is admissible evidence, a Court can act upon it; corroboration, unless required by statute, goes only to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law."

10. Having noticed the principles, we would discuss the evidence of child witness Sangita Dhirubhai. Her evidence before the Court was recorded on August 11, 1992. The learned Judge in order to satisfy himself that the child witness understood the duty to tell truth and was in a position to give rational answers, had put certain questions to her. In answer to the first question, the child witness replied that her name was 'Sangita' and that name of her father was 'Dhirubhai'; whereas name of her mother was 'Nirmalaben' and that her father was residing at village Sapar. The learned Judge wanted to know from the child witness as to where Nirmalaben was and the child witness stated that Nirmalaben was sitting in the Court Room. In answer to question as to where she was staying, the child witness stated that she was staying at Kathiavad Balashram. The learned Judge wanted to know from the child witness as to what she was doing at Balashram and the child witness stated that they are being educated there. In answer to another question, the child witness replied that she was offering prayer daily. Further in answer to question as to what would happen if somebody tells a lie, the child witness replied that the person telling lie would commit sin. Yet in answer to another question, the child witness replied that earlier she was studying at village Sapar and in answer to the last question, the witness replied that Sapar forms part of Surendranagar district. The learned Judge has reproduced the questions put to child witness as well as answers given by her thereto. After making preliminary inquiry, the learned Judge had made a note mentioning that the child witness understood the sanctity of oath and after making the note, oath was administered to the child witness.

11. The child witness in her deposition before the Court stated that her father Dhirubhai was staying at village Sapar and was serving as a postman. The witness informed the Court that the native place of her father was Segakpar where elder brother of her father was residing with his sons and daughters. The witness informed the Court that she had studied upto 4th Std.at village Sapar and that name of her mother was Nirmalaben. The witness further stated that she has three maternal

uncles, one of whom was residing at village Chital; whereas two others were residing at village Dhari. The witness stated before the Court that at village Sapar, they were residing in a rented premises belonging to one Bharvad and that Babaliben was residing adjacent to their house. The witness informed the Court that the name of father of Babaliben was Karim and the parents of Babaliben had come to village Sapar for the purpose of celebrating Diwali. The witness stated that name of one of brothers of Babaliben was Mohmad and she identified the appellant as Mohmad. She stated that she was able to identify the appellant as Mohmad because the appellant was residing near her house at village Sapar. The witness further stated that her mother and Mohmad had developed relations and that her mother had also relations with deceased Bhikhubhai Gadhvi of Surendranagar. The witness was shown photograph affixed in a driving licence and she identified that the said photograph was that of Bhikhubhai Gadhvi. The witness informed the Court that the appellant was doing labour work of excavating earth and that her mother had informed her father that she was going to Rajkot city for the purpose of taking medicines. According to this witness, the appellant had taken her mother and her with him and all had got down at village Chotila, fromwhere all had gone to village Jamjodhpur where they had stayed for about two months. The witness stated before the Court that at village Jamjodhpur, the appellant was doing labour work and was also taking her mother for doing labour work. According to this witness, it was learnt by her mother and the appellant that her uncle and father were likely to come to village Jamjodhpur in their search and, therefore, they had left village Jamjodhpur and come to Rajkot city, where they had stayed at caravanserai for some days. The witness stated before the Court that after staying at caravanserai for some days, the appellant had taken a premises on rent situated at Chunarwad Chowk at Rajkot, but on learning that her father and uncle were likely to come to Rajkot in search of her mother, they had left the house and were begging. According to this witness, her mother i.e. original accused no.2 had informed her that there was no sense in ruining their lives and, therefore, they had come back to village Sapar, but no questions were put by her father to her mother, as her father was annoyed at the behaviour of her mother. What is claimed by the child witness is that after a week,the appellant had come to village Sapar and persuaded her mother to go with him and, therefore, her mother had brought her in the company of the appellant to Surendranagar. According to this witness, at Surendranagar the appellant had contacted deceased

Bhikhubhai and from Surendranagar, all the four had gone to Rajkot city. The witness has further stated that at Rajkot the deceased had made attempts to get accommodation at caravanserai, but as no accommodation was available, they had gone towards Khodiar Temple which is situated at the base of hills. According to this witness, the appellant had spread bed sheet brought by him on which she had slept and at dawn, she had witnessed that the appellant had murdered deceased Bhikhubhai. According to her, she was awaken because of noise and on being awaken, she had witnessed that pipe blows were given by the appellant on the head of deceased Bhikhubhai.The witness identified the pipe used by the appellant which was produced before the Court as muddamal article no.11. According to this witness, her mother and deceased Bhikhubhai had relations and as this was not liked by the appellant, the deceased had expressed an apprehension that he would be assaulted by the appellant. The witness has further explained in her deposition that the appellant had given pipe blows straight on the head of the deceased, as a result of which head of the deceased was seriously wounded. The witness has further stated that because of serious injury sustained by the deceased he had died on the spot. According to this witness, in the morning the appellant had told her mother that as people had not come for grazing goats, they should leave the place immediately and, therefore, they had left the place and slept in a field. According to this witness, the appellant had thrown the pipe used by him for killing the deceased in a hay, whereas the clothes of the deceased which were taken by the deceased in a bag were given to one mendicant at Junagadh. The witness has claimed that at Junagadh they had stayed at caravanserai and that from Junagadh they had gone to village Bilkha. The witness has also stated that at village Bilkha, father of the appellant had met them and, therefore, they had stayed at the house of father of the appellant for about 15 to 20 days and the appellant had made her and her mother to beg. According to this witness, at Junagadh the appellant had quarrelled with someone and, therefore, she in the company of her mother had gone to an institution known as 'Shishu Mangal' where she in the company of her mother had stayed for 3 days. What is stated by the child witness is that the appellant had tried to meet her mother at Shishu Mangal also and, therefore, on complaints being made by other inmates of the institution, they were asked to leave the said institution by its manager. She also identified the clothes of the deceased which were given by the appellant to one mendicant at Junagadh. The witness has further stated that she was staying at Kathiavad Balashram and on

every 4th Saturday her father was coming to Balashram to meet her.

12. In cross-examination, the witness has stated that she was not tutored by any one as to how she should give deposition before the Court. During the cross-examination, the witness stated that in fact her mother had not to take any medicine from Rajkot, but she had given false excuse to her father for the purpose of going to Rajkot. The witness admitted that in her police statement she had stated that after going to the place near the pond,she had immediately gone to sleep, as she was tired and that she had got-up in the morning of the next day. The witness was confronted with her police statement and she admitted that she had not stated in the police statement that she had again come back to village Sapar, fromwhere she in the company of her mother had again gone to Rajkot with the appellant. She also admitted that it was not stated by her in her police statement that the appellant had threatened her mother with dire consequences if the fact of killing the deceased was disclosed to any one.

13. A fair reading of evidence of child witness establishes that she is a witness of truth and has given rational account of what she had seen, heard or done in the company of her mother and the appellant. There is nothing on the record to indicate that she was tutored by any one. She has no reason to falsely implicate the appellant in such a serious case. There are no major contradictions appearing in her evidence, nor she has improved her story before the Court. In fact, a bare reading of deposition of this witness makes it more than evident that she was reluctant to say something about the character of her own mother. However, as observed earlier, it is a sound rule in practice not to act on the uncorroborated evidence of a child witness and, therefore, we have tried to ascertain whether in material particulars evidence of child witness is corroborated or not.

14. We may state that the evidence of child witness Sangita stands materially corroborated by the evidence of (1) her father Dhirajlal Nanalal Mehta, PW.13 Exh.33, (2) Dr. Bhavin Kothari, PW.23 Ex.49, (3) Maliksha Alibhai, PW.24 Exh.63, (4) Manishanker Gokaldas Joshi, PW.12 Exh.29, (5) Umeshgiri Maharajgiri PW.11 Exh.27, and (6) Vasantrai D.Bhatt, PW.16 Exh.36. The father of the child witness has specifically stated in his evidence before the Court that his wife had illicit relations with the appellant and that his wife had left him in the company

of minor Sangita with the appellant. The witness has also stated that after about three months again his wife with his daughter had come to his house at village Sapar but, after 8 days the appellant had again enticed away his wife. The witness has stated that he was not knowing as to how and why the deceased was killed and as his wife was enticed away by the appellant, he had vacated the house situated at village Sapar and was residing at village Sejakpar. Again, Dr.Bhavin, PW.23 Exh.49 has stated that on postmortem examination of the dead body of the deceased he had found four injuries on the head of the deceased. The evidence on record shows that the doctor had performed postmortem on the dead body on October 31, 1991 between 4.35 P.M. and 5.35 P.M. and according to Dr. Bhavin Kothari, probable time of death of the deceased was before 36 to 48 hours of performance of postmortem examination. The probable time of death given by the doctor completely tallies with the time of death of the deceased stated by child witness Sangita. The claim of the child witness that the appellant had given away clothes of the deceased to mendicant at Junagadh also stands corroborated by the evidence of witness Maliksha Alibhai PW.24, Exh.63, who has stated that the appellant had given long loose gown of terylene and bushirt to him, which clothes were identified by child witness and other witnesses as belonging to the deceased. Further, witness Manishanker Joshi PW.12 Ex.29 has stated that he is the owner of Shri Ratansinh Mulji Dharmashala at Rajkot and that he had not permitted the deceased who had come along with the appellant, a lady and a child to stay in the dharmashala on October 29, 1991. Further, witness Umeshgiri Maharajgiri PW.11, Exh.27 has stated that he is serving at Liberty Guest House situated at Kalva Chowk of Junagadh town and that on October 30, 1991, the appellant had come to the guest house and stayed there with a lady and baby. This witness is corroborated by contemporary document namely entries in the register maintained at the guest house and produced on the record of the case at Exh.28. We may state that the child witness has sated that second time when her mother was enticed away by the appellant, they had gone to Surendranagar and stayed at a guest house. Witness Vasantrai D. Bhatt PW.16, Exh.36 in his evidence has stated that he is manager of Shiv Shakti Guest House of Surendranagar and that the appellant had come with Nirmalaben i.e. original accused no.2 and baby Sangita on October 28, 1991 and stayed there. This witness has also produced necessary entries from the register at Exh.37 in support of his case that the appellant with accused no.2 and baby Sangita had stayed at the guest house on October 28, 1991. Thus, we find that on

material particulars the evidence of witness Sangita stands corroborated by the evidence of other witnesses and it is safe to act upon her evidence tendered before the Court. Having regard to the totality of facts and circumstances of the case, we are of the opinion that the learned Judge did not commit any error in placing reliance on the deposition of child witness Sangita for convicting the appellant.

Even otherwise, circumstantial evidence on record establishes beyond reasonable doubt that in all probability, murder of the deceased was committed by the appellant. The evidence of witness Galalben Panchabhai, PW.5 Exh.15 and child witness Sangita establishes beyond reasonable doubt that the deceased was in love with original accused no.2 and that the appellant was enraged, as her mother had relations with the deceased. As far as relations between the deceased and accused no.2 are concerned, the child witness is supported by evidence of Labhuben PW.4 Exh.14, who is sister of the deceased and wife of Bhikhubhai. Her evidence unerringly indicates that some few days prior to the date of the incident the deceased had come with original accused no.2 at her house and that she had presented one Sari to accused no.2. The evidence of Kanubhai Bavabhai Vasava, PW.8 Exh.18 establishes beyond pale of doubt that the accused no.2 was describing herself as wife of the appellant. Thus, the appellant had a strong motive to commit murder of the deceased, as the deceased was his rival and the original accused no.2 was maintaining relations with the deceased. The evidence of witness Keshubhai Kalubhai Barot PW.7 Exh.17 and that of Manishanker Gokaldas Joshi PW.12 Exh.29 establishes beyond shadow of doubt that on October 29, 1991, the deceased was last seen alive in the company of the appellant. We may state that witness Manishanker of Shri Ratansinh Mulji Dharmashala of Rajkot had properly identified the appellant as the person who had come to his dharmashala with the deceased on October 29, 1991 at an identification parade which was held by witness Pragmal Bhagwanji Rathod PW.37 Exh.101 who was then Mamlatdar, Rajkot city, on November 22, 1991, in presence of independent witnesses. The evidence regarding identification of the appellant at a parade held on November 22, 1991 has almost gone unchallenged. Thus, the evidence adduced by the prosecution establishes that the deceased was last seen alive in the company of the appellant.

Further the blood stained clothes of the appellant and pipe used by him in killing the deceased were discovered pursuant to voluntary disclosure made by

him under different panchnamas. The articles discovered were sent to Forensic Science Laboratory for the purpose of analysis and the report of analyst indicates that the pipe which was discovered at the instance of the appellant as well as the clothes of the appellant had the same blood group as that of the deceased. This means that the appellant was in close proximity of the deceased when the deceased was fatally wounded and had all the opportunity to commit the murder of the deceased.

15. We may state that original accused no.2 had no motive to commit murder of the deceased because she had been maintaining relations with the deceased of her own free will. It is not the case of any one that the deceased was murdered by the child witness. Under the circumstances, an explanation was expected from the appellant as to in which circumstances the deceased had died when the deceased was seen alive last in the company of the appellant. However, we find that no explanation worth the name is offered by the appellant in his further statement recorded under section 313 of the Code except stating that the case of the prosecution against him was false. Such a denial as per law laid down by the Supreme Court will have to be treated as an additional circumstance to complete the chain. Thus, we find that the circumstances relied upon by the prosecution are fully established and they are consistent only with the guilt of the appellant and are not explainable on any hypothesis, except one sought to be proved against the appellant. The cumulative effect of the circumstances established by the prosecution is that in all probability the appellant and the appellant alone had committed the murder of the deceased.

16. The net result of the above discussion is that direct evidence which is on record of the case in the form of sworn testimony of child witness Sangita, PW.9 Exh.24 as well as circumstantial evidence on record establishes that the appellant had caused death of the deceased.

17. We may state that as observed earlier, the prosecution, in all, had examined 38 witnesses, but it is not necessary to discuss the evidence of all the witnesses in detail for deciding this appeal because the relevant evidence is already taken into consideration and discussed by us as indicated above.

18. This brings us to the question as to what is the nature of the offence committed by the appellant. The case pleaded by the learned counsel for the appellant is

that the appellant had seen the deceased and the accused no.2 in a compromising position, as a result of which, he was enraged and had caused death of the deceased, which cannot be termed as culpable homicidal amounting to murder, but should be treated as culpable homicidal not amounting to murder punishable either under Part-I or Part-II of section 304 of the Indian Penal Code. We may state that no suggestion was made to child witness Sangita that the appellant had seen the deceased and the original accused no.2 in a compromising position. The child witness has not claimed in her evidence that she had seen her mother in a compromising position with the deceased and, therefore, the appellant had given blows on the head of the deceased with an iron pipe. The medical evidence on record establishes that the deceased had sustained serious injuries on vital part of his body viz. head. According to the doctor, the cause of death was 'comma' which was result of injury to the brain intra crannial hematoma and fracture of skull bone. The doctor, who had performed the postmortem on the dead body of the deceased had found four external injuries and following corresponding internal injuries "(i) Linear fracture of skull bone in midline 6 cm long extending from frontal bone region to parietal bone region, (ii) Depressed fracture 8 cm x 10 cm in size over right parietal region, right temporal and right occipital region, brain protruding out, menniges tear and severe crush injury on right side brain." The prosecution evidence further establishes that the deceased had died on the spot. It is not the case of the appellant that the blows were intended to be given on some other parts of the body of the deceased and because of supervening cause like sudden intervention of someone or movement of the deceased, the blows had struck on the head of the deceased. Therefore, it is safe to conclude that it was the intention of the appellant to cause those very injuries which were found on the head of the deceased. The injuries sustained by the deceased were on vital part of his body and they were caused with an iron pipe with great force. If these factors which are established on the record of the case are considered with the internal injuries noticed by the doctor, there is no manner of doubt that the injuries caused to the deceased were sufficient in the ordinary course of nature to cause his death and, therefore, the case would be governed by Clause Thirdly of Section 300 of I.P.C. Thus, we find that conviction of the appellant under section 302 I.P.C. is not erroneous and is not liable to be altered to one punishable under Part-I or Part-II of Section 304 of the Indian Penal Code as claimed by the learned counsel for the appellant.

The conviction of the appellant of the offence punishable under section 135(1) of the Bombay Police Act, 1951 is not challenged at all. There is no manner of doubt that the appellant had committed breach of the notification issued under section 37(1) of the said Act, which is produced on the record of the case at Exh.7. Therefore, his conviction under section 135(1) of the Bombay Police Act, 1951 recorded by the learned Judge is hereby confirmed.

19. The net result of the above discussion is that we do not find any substance in the appeal and the appeal is liable to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed. Muddamal articles to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(J.M.Panchal,J.)

(A.H.Mehta, J.)

(patel)